

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox

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Subject: Pre-notice Discussion of Proposed Regulatory Action to Address General Plan Decisions: Amendment of Reg. 18704.2 (Direct/Indirect Involvement) and Adoption of Reg. 18707.10 ("Public Generally" Exception)

Date: April 28, 2004

I. EXECUTIVE SUMMARY

At its March 2004 meeting, the Commission considered whether it is desirable to adopt special regulatory provisions to address general plan issues, and, specifically, at which steps of Step 4 through Step 7 should such regulatory amendments be made. The Commission rejected Step 5 (materiality standard) language and Step 7 ("public generally" exception) language which included options for a "proportional" effects rule with "cap language" and a "safe harbor" option which listed objective criteria.

However, the Commission directed staff to continue development of Step 4 (direct/indirect involvement) language. In addition, the Commission decided against a rule establishing that it is not reasonably foreseeable that a material financial effect will result from a decision under certain circumstances, but asked staff to incorporate the proposed Step 6 (reasonable foreseeability) language and concepts into a special "public generally" exception for general plan decisions. At this direction, staff now presents proposed language for Step 4 and Step 7 approaches:

1) *Step 4 – Direct/Indirect Involvement (Real Property)*: Amend regulation 18704.2¹ to specify that the involvement of real property in certain broad, policy-making general plan decisions is deemed **indirect** so, as a result, it is presumed that the effect on real property indirectly involved in these types of decisions is **not material**. The rationale for this approach is that where the decision is very general and does not implement specific actions, real property will be indirectly involved.

¹ All citations herein are to the Government Code sections 81000 – 91014 unless otherwise noted. All regulatory citations are to Commission regulations at Title 2, sections 18109 – 18997, of the California Code of Regulations.

2) *Step 7 – “Public Generally” Exception (All Economic Interests)*: Adopt a special “public generally” exception which is applicable to certain (broad/policy) general plan decisions. This language is based on the concept that where a policy-setting decision does not implement specific action and applies “across-the-board,” the public official is financially affected in a manner that is indistinguishable from the way the public generally is financially affected. While this approach applies to all types of economic interests, it does not provide an explicit description of “significant segment” and “substantially the same manner.”

Decision points and corresponding staff recommendations are summarized below:

- **Decision 1:** Is it desirable to adopt special regulatory provisions to address general plan decisions at Step 4 (direct/indirect involvement)?

Staff concludes that it is desirable to adopt regulatory language which clarifies application of the conflict-of-interest rules to broad, policy-making general plan decisions. The staff supports the proposed amendment to regulation 18704.2. This approach is beneficial because it is consistent with other direct/indirect involvement rules. In addition, it would assist public officials when determining whether real property is indirectly involved in these types of decisions.

- **Decision 2:** If such provisions are desirable, should changes be made at Step 7 (“public generally” exception)?

Staff does not recommend adoption of proposed regulation 18707.10 because it is based on the assumption that the financial effects of certain general plan decisions will be “indistinguishable.” Where the assumption is incorrect, it may have the unfavorable result of allowing participation by an official who has large business interests or multiple economic interests and who is, therefore, financially affected in a distinct manner. Additionally, further revisions to the regulations may not be necessary since the amendment of regulation 18704.2 may adequately address problems with the presumption of a material financial effect when the official merely resides in the jurisdiction.

This regulatory item is scheduled for adoption at the August 2004 Commission meeting.

II. BACKGROUND

A. Prior Commission Action

This regulatory project was undertaken to address specific concerns raised by the County of San Diego regarding application of the Commission’s conflict-of-interest analysis to general plan decisions. Because a general plan governs the direction of future land use in a city or county, members of the regulated community have proposed that

special rules be developed for general plan decisions to increase participation by disqualified public officials. Following a series of interested persons' meetings,² draft regulatory language was presented to the Commission at its June 2003 meeting. At that time, the Commission rejected a regulatory proposal presented by the County of San Diego, but directed staff to develop regulatory proposals at Step 4 (direct/indirect involvement), Step 5 (materiality standard), Step 6 (reasonable foreseeability), and Step 7 ("public generally" exception) of the conflict-of-interest analysis and examine related issues.

At its September 2003 meeting, the Commission adopted regulation 18709 to address some of the general plan concerns. This regulation allows, in limited circumstances, an official to participate in certain decisions which may be "related" to a decision in which the official has a conflict of interest, provided that the decisions can be segmented. Subsequent to this adoption, staff held an additional interested persons' meeting in January 2004 and continued refinement of draft regulatory language for Step 4 through Step 7.

As mentioned, the Commission ultimately directed staff at its March 2004 meeting to continue development of approaches for Step 4 (direct/indirect involvement) and Step 7 ("public generally" exception). Description of and arguments for and against these approaches are provided in this memorandum.

B. General Plan

As discussed in staff's memorandum to the Commission entitled, "*Overview of Public Generally Regulations as Applied to General Plan Decisions*," May 23, 2003, California law requires each city and county to adopt a general plan "for the physical development of the county or city, and any land outside its boundaries which...bears relation to its planning." (Government Code section 65300.)³

A general plan has several mandatory elements which consist of the following: land use, circulation, housing, conservation, open space, noise, and safety. (Government Code section 65302.) All of these elements must be consistent with one another. Furthermore, all developmental decisions must be consistent with the general plan. The land use element is perhaps the broadest in scope and is often perceived as being the most representative of the general plan. General plans may be amended by private or public initiative. Some general plan amendments facially apply to the entire jurisdiction, but in practice affect only a discrete property or area in the jurisdiction.⁴

² These meetings took place in July 2002, September 2002, and February 2003.

³ See staff memorandum, "*Overview*," *supra*, for a more detailed discussion of general plan laws and Commission staff advice.

⁴ For example, a proposed circulation element may be applicable to an entire jurisdiction but the element proposes to construct a traffic median on a particular road within the city, or a general plan amendment may decrease the number of housing units that could be added to identifiable neighborhoods.

C. Eight Step Conflict-of-Interest Analysis

The Act prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Sections 87100, et seq.) A conflict of interest is based on the following questions:

1. Is the individual a “public official”?
2. Will the public official be making, participating in making, or influencing a governmental decision?
3. What are the public official’s economic interests?
4. Will one or more of those economic interests be directly or indirectly involved in the governmental decision?
5. Based on the applicable materiality standard, is the financial effect of the governmental decision on those economic interests “material”?
6. Is the material financial effect of the governmental decision on the public official’s economic interests reasonably foreseeable?

If the answers to all of the above are yes, then the public official will have a conflict of interest with respect to the governmental decision of his or her agency unless the following two questions can be answered in the affirmative:

7. Does the “public generally” exception apply?
8. Is the public official legally required to participate in the governmental decision?

D. Current Commission Rules and Advice**1. Step 4 - Direct/Indirect Involvement (Real Property)**

The most common economic interest prompting requests for advice regarding general plan decisions is a public official’s economic interest in his or her principal residence. (See staff memorandum, “*Overview*,” *supra*.) At Step 4, an official must determine if his or her interest in real property is directly or indirectly involved in a general plan decision. This determination is necessary in identifying the appropriate materiality standard applicable to real property (Step 5) and usually has a significant impact on an official’s obligation to disqualify from a decision because, where real

property is directly involved in a decision, the financial effect of the decision is presumed to be material.⁵ (Regulation 18705.2(a)(1).)

Alternatively, if such property is indirectly involved in a decision, then the financial effect of the decision is presumed *not* to be material. Notwithstanding this presumption, there still may be proof that the official has a conflict of interest due to the nature of the general plan or land use element decision. (See regulation 18705.2(b)(1).)

In general, Commission advice as to whether real property is directly or indirectly involved in a general plan decision varies based on the details of the decision. (See staff memorandum, “*Overview*,” *supra*.)

2. Step 7 - “Public Generally” Exception (All Economic Interests)

The Act provides that a public official may participate in a governmental decision despite the existence of a disqualifying conflict of interest if the financial effect of that decision on the official’s economic interests will not be *distinguishable from the decision’s effect upon the public generally*. (Section 87103; regulation 18700(a).) This qualifier is the genesis of the “public generally” exception.

The primary form of the “public generally” exception is embodied in regulation 18707.1 (the general rule). Currently, there are also six specialized forms of the “public generally” exception. (Regulations 18707.2 - 18707.9.) The exception has two components: (1) all, or a *significant segment*, of the public within the agency’s jurisdiction will be affected by the decision, and (2) the effect upon the public official’s economic interest will be in *substantially the same manner* as the effect upon the significant segment. (Regulation 18707(b).) While the Commission has quantified the term “significant segment,” the same is not true for the term “substantially the same manner.” For a variety of reasons including the difficulty in developing a “bright line rule” for what it means to be affected in “substantially the same manner,” the Commission has consistently determined since 1975 that the term “substantially the same manner” should be applied on a case-by-case basis. (See staff memorandum, “*Overview*,” *supra*.)

Nevertheless, all “public generally” regulations, whether the general rule (regulation 18707.1) or a specialized rule (regulations 18707.2 – 18707.9), reflect the two-pronged approach (see Table 1 at p. 14).

⁵ An interest in real property includes leaseholds. There are separate sets of factors applicable to leaseholds which may rebut the presumptions with respect to materiality. These factors include an effect on: the termination date of the lease; the amount of rent paid by the lessee; the value of the lessee’s right to sublease the real property; the legally allowable use or the current use of the real property by the lessee; the use or enjoyment of the leased real property by the lessee. (Regulation 18705.2(a)(2).)

III. DISCUSSION OF PROPOSED REGULATORY ACTION

A. Overview

Whether an official's potential disqualification from general plan decisions is a quantifiable concern is unclear.⁶ When this issue does arise, however, it is of particular importance to the public. The County of San Diego has emphasized that disqualification in such decisions is problematic because, when an official is disqualified, it prevents the official from representing the district he or she was appointed or elected to represent.⁷

Of course, there are two existing exceptions which allow an otherwise disqualified official to participate in general plan and other decisions. Where a quorum cannot be achieved due to disqualification, section 87101 allows participation if it is established that participation is "legally required." Further, the "public generally" exception as embodied in the current regulations applies in many circumstances where the official will be affected in substantially the same manner as a significant segment of the jurisdiction or the district to which the official was elected. Thus, this consequence of non-participation is no different in other contexts. Quite simply, the Act prohibits a public official from participating in a decision in which he or she has a financial interest and where no exception applies.

How the determination of whether a particular decision will materially affect a public official in a way that is distinguishable from the way the decision will affect the public generally, is the more basic concern. As previously mentioned (staff memorandum, "*Overview*," *supra.*), real property tends to be the most common trigger for a conflict of interest in general plan decisions. In general, real property located within a general plan area is frequently considered "directly involved" and, therefore, presumed to be materially affected by the decision. As a result, the regulatory path to the conclusion that a public official is disqualified begins at the point where the level of involvement (Step 4) is determined. As such, staff believes that clarification at Step 4 is clearly desirable.

Staff does not support the creation of a special "public generally" rule applicable to general plan decisions if the rule does not require an assessment of whether the financial effect on an official's economic interest is "indistinguishable." Precisely because general plan decisions govern the direction of future land use in a city or county, it is particularly important that a comparison is made between the effect on the official and other members of the public. Staff agrees that attempting to apply the general rule for the "public generally" exception is at times challenging in general plan decisions.

⁶ Although no data is collected which tracks how often the "public generally" exception is invoked as an affirmative defense, enforcement staff indicates that "public generally" effects are potential factors in few enforcement cases. (Staff's memorandum to the Commission entitled, "Interpretation of the 'Public Generally' Language in Section 87103," August 25, 2000.)

⁷ A member of the public from the County of San Diego has also written to the Commission expressing concern regarding these issues. In contrast to representatives of the county officials, this citizen does not believe the rules should be changed to permit increased participation by an official who has a financial interest in a general plan decision.

However, elimination of either the “significant segment” or “substantially the same manner” prong may have the unintended consequence of expanding an exception to more than narrow circumstances.⁸

The two approaches presented to the Commission with this memorandum are alternatives to one another. Staff believes the Step 4 (direct/indirect involvement) language should be chosen if the Commission desires a moderate course of action. This approach maintains the current rebuttable presumption analysis applicable to real property interests, thereby offering an elasticity that fits to any set of facts. While it does not provide a conclusive rule or a safe harbor, it gives an official the benefit of a presumption of non-materiality when a financial interest arises from real property.

The Step 7 (“public generally” exception) should be chosen if the Commission determines that participation by public officials having a financial interest in certain general plan decisions should be increased and that existing “public generally” rules do not allow for such participation. If the Commission decides to establish a special “public generally” exception for general plan decisions, Step 4 language should not be adopted. While it is possible to adopt language for both approaches at the same time without creating a conflict between the two rules, it could cause unnecessary confusion among non-practitioners as to whether or not an official should “skip” directly to the “public generally” exception. The official could - - obviating a separate rule for general plan decisions at Step 4 (direct/indirect involvement). The rule presented in the Step 4 language would, in effect, be swallowed up by regulation 18707.10.

B. Proposed Regulatory Language

As directed by the Commission, staff presents proposed language for both Step 4 (direct/indirect involvement) and Step 7 (“public generally” exception).

The language presented in both proposed regulations applies to decisions which identify “planning objectives” or “are otherwise exclusively one of policy.” The purpose of this language is to sift out general plan decisions which are being made in order to enable developers, businesses or other interests to generally execute their economic agenda within the community. As a result, the eligibility criteria for both steps are designed to capture general plan decisions which are generic or advisory, while excluding general plan decisions which are executory and implement policy.

Finally, the proposed criteria for general plan decisions were developed and described by terms rooted in land use and development law, cross-referencing specific sections of Title 7 of the Government Code (Planning and Zoning). These terms are used in the proposed language for regulations 18704.2 and 18707.10.

⁸ Exceptions are to be strictly construed. (*Julius Goldman's Egg City v. Air Pollution Control Dist.*, 116 Cal. App. 3d 741, 746.)

1. Proposed Amendment to Regulation 18704.2 {Decision 2}

The proposed amendment to regulation 18704.2 specifies when real property is indirectly involved in certain types of general plan decisions. (Attachment 1.) The rationale for this language is that where the decision is very general and does not implement specific actions, real property will be indirectly involved.

Deeming real property to be *indirectly* involved in a certain type of general plan decision is significant since a decision indirectly involving real property is presumed *not* to have a material financial effect on the official under Step 5 (materiality standard).

a. Provisions

In particular, proposed **subdivision (b)(3)** of regulation 18704.2 would provide that real property is **indirectly involved** if in a decision if the decision:

- Solely concerns the adoption or amendment of a general plan;
- Only identifies planning objectives or is otherwise exclusively a policy decision;
- Was not initiated by the public official, by a person that is an economic interest of the public official, or by a person representing either the public official or an economic interest of the public official;
- Is preliminary in nature, in that a further decision or decisions by the official's agency is necessary prior to the implementation of the planning or policy objectives. (Examples of "further decisions" include but are not limited to permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent);
- Does not concern an identifiable parcel or parcels or development project; and
- Does not concern the agency's prior, concurrent or subsequent approval of, or change to, any of the examples specified above.

This language also contains a provision permitting this rule to be used if a parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided that the map or diagram depicts all parcels located within the agency's jurisdiction and economic interests of the official are not singled out. Note that changes have been made in this version of the proposed amendment to maintain

consistency with other provisions of regulation 18704.2 and with provisions of proposed regulation 18707.10.⁹

In addition to these provisions, proposed **subdivision (c)** of regulation 18704.2 would provide definitions as follows:

“(c) Definitions - General Plans. The definitions below apply to this regulation:

(1) A decision ‘solely concerns the adoption or amendment of a general plan’ when the decision, in the manner described in Government Code sections 65301 and 65301.5, grants approval of, substitutes for, or modifies any component of, a general plan, including elements, a statement of development policies, maps, diagrams, and texts, or any other component setting forth objectives, principles, standards, and plan proposals, as described in Government Code sections 65302 and 65303.

(2) ‘General plan’ means ‘general plan’ as used in Government Code, Title 7 (Planning and Zoning), Division 1 (Local Planning), Article 5, sections 65300, et seq.

(3) ‘Specific plan or its equivalent’ means a ‘specific plan’ or any equivalent plan adopted by the jurisdiction to meet the purposes described in Government Code, Title 7 (Planning and Zoning), Division 1 (Local Planning), Article 8, sections 65450, et seq.”

b. Pros & Cons

This amendment would result in real property being considered indirectly involved in certain general plan decisions. This approach is beneficial because it is consistent with other direct/indirect involvement rules. Currently, under regulation 18704.2(b), there are other decisions which are already considered indirectly involved, simply by virtue of the type of decisions they are (e.g., amendments to existing zoning ordinances or other land use regulations, and repairs, replacements, or maintenance of streets, etc.). The types of decisions governed by the indirect involvement standard are decisions where it would not be clear which type of involvement applies, but for the current rules of subdivision (b). Similarly, at times, it has been unclear as to whether real property was directly or indirectly involved in a general plan decision since these determinations are fact-dependent. (See staff memorandum, “*Overview*,” *supra*.)

This amendment would offer guidance to public officials in determining the type of involvement of the real property, and, in turn, the applicable materiality standard (or presumption). In addition, this language would resolve any apparent inconsistencies in past advice letters dealing with general plan decisions.

⁹ These changes are: 1) this rule would apply only to a decision which “solely concerns” the adoption or amendment of a general plan; and 2) language mandating that further decisions be required is included.

It should be noted that the effect of this language would be limited to the extent that a presumption is not conclusive but rather rebuttable. Several interested persons have commented that circumstances (under Step 5 of the conflict-of-interest analysis) surrounding general plan decisions will frequently rebut a presumption of non-materiality since the decisions are often meant to alter existing land use. Such circumstances include the development or income producing potential of real property, the use of the property, and the character of the neighborhood. (Regulation 18705.2(b)(1)(A)-(C).) Therefore, according to these persons, the proposed Step 4 language may not go far enough to allow participation by public officials in general plan decisions.

However, if the decision before the official is truly a broad, policy-setting decision not linked to any specific executory action, the presumption of non-materiality should rarely be rebutted. This is the case because the materiality standard for indirectly involved real property only provides that the presumption may be rebutted by:

“...proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest....”
(Regulation 18705.2(b)(1).)

The current rules do not allow for the presumption to be rebutted on principle, but rather require facts which demonstrate reasonable foreseeability.¹⁰ Where such facts exist, it is not appropriate to allow participation by the official. The proposed language for regulation 18704.2 does not attempt to capture those scenarios (nor does the language for proposed regulation 18707.10).

Staff Recommendation: The staff supports the proposed amendment to regulation 18704.2. This approach is beneficial because it is consistent with other direct/indirect involvement rules. This amendment would offer guidance to public officials in determining the type of involvement of the real property, and, in turn, the applicable materiality standard (or presumption). Staff also believes that it may be prudent to adopt these changes now to see if they resolve the issues raised by the regulated public. The Commission may always consider new changes to the “public generally” exception if the regulation 18704.2 changes do not resolve the issues.

¹⁰ Staff presented language attempting to further define when “reasonable foreseeability” exists in general plan decisions at the March 2004 Commission meeting. However, the Commission found this approach undesirable because it could result in a legal fiction which might not incorporate pertinent facts establishing that, in a particular situation, it actually *is* reasonably foreseeable that a material financial effect would occur.

2. Proposed Adoption of Regulation 18707.10

In March 2003, the Commission was presented with proposed regulatory language which, following the traditional two-pronged approach, attempted to provide a special “one-size fits all” “public generally” exception applicable to general plan decisions. That language included objective factors meant to ensure that an official using the exception was in fact being financially affected in substantially the same manner as a significant segment of the public. The proposed language required consideration of housing density, property ownership, parcel size, and the effect of the decision on the zoning designations and uses of an official’s real property. The Commission rejected this language because of concern that the tests might be cumbersome in trying to define what “substantially the same manner” means. However, the Commission asked staff to incorporate the proposed Step 6 (reasonable foreseeability) language and concepts into a special “public generally” exception for general plan decisions. This revised language is presented to the Commission as proposed regulation 18707.10.

a. Provisions

Proposed regulation 18707.10 is based on the Step 6 (reasonable foreseeability) language previously presented to the Commission at the March 2004 meeting. Because language presented for Step 4 through Step 7 was drafted to be consistent with and, if desired, to be used in conjunction with one another, similar provisions in the language were presented at each step. For this reason, the language now presented for Step 7 (“public generally” exception) essentially contains the same provisions as the language presented for Step 4 (direct/indirect involvement) with two exceptions, as discussed below. Additionally, this language is broader in that it applies to *all* economic interests, not just real property interests.

The Step 7 language is meant to serve as a safe harbor upon which a public official may rely in determining that the effect of a decision on a public official’s economic interests is indistinguishable from the decision’s effect on the public generally. This language is based on the assumption that with policy-setting decisions which do not implement specific action, and which apply “across-the-board,” the public generally is affected in a way that is indistinguishable from the public official.

Proposed regulation 18707.10 (Attachment 2) would apply to a decision which meets the criteria of the proposed amendment to regulation 18704.2 with two exceptions:

Initiation of a Matter by Certain Persons

Unlike proposed subdivision (b)(3) of regulation 18704.2, regulation 18707.10 will govern a decision that is initiated by the public official, by a person that is an economic interest of the public official’s, or by a person representing either the public official or an economic interest of the public official’s. At the point that the “public generally” exception is applied, it has already been determined that an economic interest of the official’s will experience a material financial effect, and the critical issue is

whether the financial effect on the official is indistinguishable from the financial effect on the public. Who initiated the matter, which speaks more to direct or indirect involvement, is not relevant at Step 7 and so the “initiated by” language is excluded from this proposed regulation.

General Applicability

Because the “public generally” exception allows participation only where the effect of a decision on the official’s economic interest is indistinguishable from the effect on the public generally, it is important that the proposed language include language addressing the decision’s effect beyond that effect experienced by only the official. Consequently, proposed regulation 18707.10(a) requires that:

“(4) The general plan decision is one with comprehensive, broad, or general applicability to the entire jurisdiction of the public official’s agency or the district the public official represents.”

This language is not included in the proposed amendment to regulation 18704.2. It should also be noted that, as with the other special “public generally” exceptions, the public official has the discretion as to whether he or she wishes to apply regulation 18707.1 (the general rule) rather than regulation 18707.10.

b. Pros & Cons

Regulation 18707.10 offers one way in which to resolve public concerns regarding disqualification of public officials from general plan decisions by concluding that, if the criteria are met, the material financial effect of a decision on a public official’s economic interest is indistinguishable from the decision’s financial effect on the public generally. This regulation allows officials to avoid the problems which, it is claimed, result in unnecessary disqualification from participating in these decisions.

Addressing concerns raised by the County of San Diego at Step 7 seems appropriate since the type of general plan decisions contemplated by the proposed language are those which would broadly apply to members of the significant segment. Underlying this approach is the principle that it does not matter whether the official’s real property will experience a material financial effect since a large enough number of other persons will experience a similar type of effect as a result of the decision. Additionally, proposed regulation 18707.10 is consistent with the past Commission practice of developing special “public generally” rules for particular types of decisions which occur regularly.

However, adopting a special “public generally” rule for general plan decisions can also be viewed as another step in a steady progression to devise alternative requirements of the general rule. (See regulations 18707.2 – 18707.9.) Because exceptions to the Act’s rules are to be interpreted narrowly to uphold its purposes and objectives, adopting

yet another special rule under this step may broaden the exception rather than keep it narrow, and, consequently, may not be desirable.

Another problem with dealing with the general plan issues by adopting regulation 18707.10 is that a public official may have expended limited resources in assessing the prior steps of the conflict-of-interest analysis. Delaying an analysis which would apply specifically to general plan decisions may not be as helpful as if the analysis were incorporated at an earlier step. On the other hand, if the general plan issues are addressed at Step 7 as proposed, it will be clear that a public official may participate in a decision despite a resulting material financial effect. As with the other proposed language, regulation 18707.10 is drafted narrowly to apply only to the broad, policy-making type of general plan decisions.

The proposed language offers public officials a way to be sure that this exception applies because it provides clear criteria. However, once it was determined that the criteria were met, there would be no subsequent guard against improper participation. Once an official qualified for the “public generally” exception, he or she would essentially have a “free pass.”

Assessment and Comparison of Financial Effects

As mentioned above, the Act defines a conflict of interest in terms of “financial effects.” (Sections 87100 and 87103.) Specifically, section 87100 prohibits a public official from participating in a decision in which he or she has a “financial interest.” A public official has a “financial interest” if it is “. . . reasonably foreseeable that the decision will have a material **financial** effect, distinguishable from its effect on the public generally” (Section 87103, emphasis added.)

The proposed language for regulation 18707.10 is based on the premise that if it is reasonably foreseeable that a public official will be financially affected by his or her agency’s decision in a way that is material, the official can nevertheless participate in the decision as long as it is a broad decision which applies jurisdiction-wide. This approach does not specifically consider the financial impacts on the official as compared to a significant segment of the public generally. This is a critical omission and may result in a “per se” rule permitting otherwise disqualified public officials to participate in general plan decisions because the proposed regulation does not incorporate the Act’s “financial effects” requirement in the two-pronged manner. This proposed regulation merely relies on the widespread application of a broad general plan decision. While a decision may “apply” to all persons jurisdiction-wide, the application of a decision to all persons does not alone determine the magnitude of the financial effects on such persons, which is the purpose of the current “substantially the same manner” prong of the “public generally” exception.

How much property or how many businesses an official owns, as well as the financial gain resulting from a particular decision, in comparison to others, is a critical aspect of the “public generally” exception. (See *In re Ferraro* (1978) 4 FPPC Ops. 62,

which discusses that the number of parcels owned by a public official can result in a distinguishable effect; *In re Legan* (1985) 9 FPPC Ops. 1, which discusses the significance of parcel size.) For example, if a public official owns multiple residential property units, the effect of the decision, in the aggregate, on the public official may be many times greater than the effect upon members of the significant segment which could own, on average, one residential property unit each. The proposed language does not safeguard against the possibility that a public official will stand to gain from a governmental decision in a manner indistinguishable from the public generally, because of the magnitude of the aggregate effect. In addition, it does not consider the magnitude of financial effects resulting from multiple economic interests.

The Two-Pronged Approach

The proposal also departs significantly from the methodology the Commission uses to implement the “public generally” exception. From its initial adoption in 1976, the Commission has used the same two-pronged approach to assess whether financial effects are “indistinguishable.” *First*, the decision must financially affect a significant segment of the public generally and *second*, the decision must affect the public official’s economic interests in substantially the same manner as it will affect that significant segment. The Commission’s regulations use this two-pronged analysis not only with respect to its general exception, but also, in one form or another, with respect to the specialized exceptions. (See table below.) The analysis provided by regulation 18707.10 omits this traditional approach for comparing financial effects.

Table 1

| Presence of Two-Pronged Approach in Specialized “Public Generally” Exceptions (Regulations 18707.2 – 18707.9) | |
|--|---|
| “Significant Segment” Concept | “Substantially the Same Manner” (Comparison) Concept |
| <p>Regulations 18707.2, 18707.4, 18707.5, and 18707.7 quantitatively define “significant segment.”</p> <p>Regulation 18707.6 contains the “significant segment” concept by requiring that the decision affect “other persons subject to a state of emergency.”</p> <p>Regulation 18707.9 contains the “significant segment” concept by requiring that the decision affect the same portion of the public as regulation 18707.1, or at least ten percent of the residential property units.</p> | <p>Regulations 18707.4, 18707.6, 18707.7 and 18707.9¹¹ each expressly contain the “substantially the same manner” prong in some form.</p> <p>Regulation 18707.2 contains the “substantially the same manner” concept by requiring that rate or assessment decisions are “proportional” or “across the board.”</p> <p>Regulation 18707.5 provides an “indistinguishable income test” pursuant to section 87103.5.</p> |

¹¹ Subdivision (b) expressly requires that a public official be affected in “substantially the same manner.” Subdivision (a) uses a numerical ownership test for the “substantially the same manner” prong.

Staff recommendation: Staff agrees that determining whether the “public generally” exception may be used is difficult at times because it requires a factual analysis. As a result, regulatory action further clarifying the application of this exception is desirable. Because exceptions to the Act’s rules are to be interpreted narrowly to uphold its purposes and objectives, adopting yet another special rule under this step may broaden the exception rather than keep it narrow.

C. Examples

General plan questions have arisen in a variety of factual contexts. The following summarizes how the regulatory language would work in different circumstances:

- *General Plan Amendments which Implement Specific Action Pertaining to Identifiable Parcels in the Jurisdiction:* Many requests involve general plan amendments which affect identifiable parcels in the jurisdiction. For example, the *Montandon* Advice Letter, No. A-93-182, dealt with an amendment to a city’s general plan by adoption of a circulation element. However, although this circulation element ostensibly applied to the entire jurisdiction, it had proposed construction of a median on a particular road within the city. Similarly, the *Solely* Advice Letter, No. A-93-107, concerned a general plan amendment relating to “possible changes in the zoning classifications for properties located in the Washington Park, St. Vincent’s Hill, and Vallejo Heights neighborhoods.” The proposed changes were, in part, to significantly decrease the number of units which could be added to those neighborhoods.

| Amendments which Implement Specific Action Pertaining to Identifiable Parcels | |
|---|---|
| Proposed Step 4 Language | Proposed Step 7 Language |
| Indirect effects would NOT apply to decisions which implement specific action pertaining to an identifiable parcel. | “Public generally” exception would NOT apply to decisions which implement specific action pertaining to an identifiable parcel. |

- *General Plan Amendments Initiated by Private Persons:* Frequently, general plan amendments for identifiable parcels are initiated, or closely related to actions initiated, by private persons. (See, e.g., *Hensley* Advice Letter, No. A-01-291, developer acting as agent for property owner seeks general plan amendment; *Barrow* Advice Letter, No. A-01-260, application by property owner for general plan amendment is likely; *Whittier* Advice Letter, No. A-99-257, owners want to build on their property and the uses of the property are under consideration as part of the town’s housing element; *Rudnansky* Advice Letter, No. I-90-429, general plan amendment includes redesignation of the land use on specific property owned by developers also seeking conditional use permit.)

| Amendments Initiated by Private Persons | |
|--|---|
| Proposed Step 4 Language | Proposed Step 7 Language |
| Indirect effects would NOT apply to decisions <u>initiated</u> by certain persons. | Who initiated decision is not relevant to “public generally” exception analysis; proposed regulatory changes may apply. |

- *General Plan Decisions Impacting the Entire Jurisdiction:* A review of past Commission advice letters revealed that only in a few instances do requests for written advice apply broadly to an entire jurisdiction. When they come up, decisions generally pertain to adoption of a general plan or major revisions to the plan. For example, the *Mattas* Advice Letter, No. A-02-076, involved a review of the housing element, proposing to increase the number of dwelling units in the jurisdiction by over 4,000 units over a twenty-year period. The *Woodruff* Advice Letter, No. A-01-157, pertained to the adoption by a city council of the city’s general plan.

| Decisions Impacting the Entire Jurisdiction | |
|--|--|
| Proposed Step 4 Language | Proposed Step 7 Language |
| Proposed regulatory language does not require that a general plan decision impact the entire jurisdiction in order for the Step 4 language to apply. | Proposed Step 7 language would explicitly apply <i>only</i> to those decisions which impact the entire jurisdiction. |

In addition, Table 2 (Attachment 3) further illustrates how the proposed regulatory language would apply under the Step 4 and Step 7 language.

Attachments:

Regulation 18704.2 – Attachment 1

Regulation 18707.10 – Attachment 2

Table 2 – Attachment 3

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